No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

FRANK A. CARDILLO, Deputy Commissioner, United States Employees' Compensation Commission, *Petitioner*,

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC. AND VIRGINIA C. TICER.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENTS, LIBERTY MUTUAL INSURANCE COMPANY & E. C. ERNST, INC.

HOGAN & HARTSON,
NELSON T. HARTSON,
ARTHUR J. PHELAN,
EDWARD B. WILLIAMS,
Counsel for Respondents, Liberty Mutual Insurance Company, and E. C. Ernst, Inc.

INDEX.

	Page
Summary of Argument	1
Argument	3
Conclusion	25

TABLE OF STATUTES.

1. Act of May 17, 1928 (District of Columbia Workmen's Compensation Law) see 612, 45 Stat. 600, D. C. Code, 1940, Title 36, Chapter 5 ..... 18, 20

2. Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, Chapter 509, 44 Stat. 1424, 33 U. S., Chapter 901 et seq. 12, 18

TABLE OF CASES.

Alaska Packers' Assoc. v. Industrial Accident Comm. of Calif. 294 U. S. 532	24
Alpert v. Powers, 223 N. Y. 97	16
Baumback v. Industrial Commission of Ohio, 39 O. App. 101, 17 N. E. (2d) 389	17
Busby v. Electric Utilities Union, 323 U. S. 72	19
Case v. Pillsbury, 148 F. (2d) 392	12
Del Vecchio v. Bowers, 296 U. S. 280	19
District of Columbia v. Pace, 320 U. S. 698	19
Employers' Liability Assurance Corp. v. Hoag, 69 F. (2d) 227	6
Finley, In Re, 141 Ore. 138, 16 Pac. (2d) 648	17
Fisher v. U. S., Supreme Court of U. S., Oct. term, 1945 No. 122, decided June 10, 1946	19
Goodrich, B. F. Co. v. Britton, 139 F. (2d) 362	6, 21
Gray v. Congleton, 273 Ky. 716, 93 S. W. (2d) 829	17
Guenesa v. Rulon, Inc. 124 Pa. Super 569, 189 A. 524	11
Keller v. Reis and Donovan, Inc., 195 A. D. 45, 185 N. Y. S. 741	15
Kerin v. Industrial Commission, et al., 239 Wisc. 617, 2 N. W. (2d) 223 (Feb. 10, 1942)	7
Kowalek v. New York Consolidated Railway Co., 229 N. Y. 489, 128 N. E. 888	12

Page

Levchuk v. Krug Cement Products Co., 246 Mich. 589, 225 N. W. 559 17
Norwood v. Tellico River Lumber Co., 146 Tenn. 682, 244 S. W. 498 17
Ogden Transit Co. v. Industrial Commission, 95 Utah 66, 79 P. (2d) 17 17
Orsinie v. Torrance, 96 Conn. 352, 113 A. 924 10
Public Service Co. of Northern Illinois v. Industrial Commission, et al., 370 Ill. 334 (1939), 18 N. E. (2d) 914 8
Republic Underwriters v. Durrell, et al., 126 S. W. (2d) 752 (1939) 9
Schultz v. Champion Welding and Manufacturing Co., 230 N. Y. 309, 130 N. E. 304 17
Standard Accident Ins. Co. v. Hoag, 66 F. (2d) 275 6
State Highway Comm. v. Saylor, 252 Ky. 743, 68 S. W. (2d) 26 17
Swanson v. Latham and Crane, 92 Conn. 87, 101 A. 492 11
Tallon v. Interborough Rapid Transit Co., 232 N. Y. 410, 134, N. E. 327 14
Taylor v. Gulf Refining Co., 11 La. App. 270, 122 So. 162 17
Terminal Shipping Co. v. Branham, 47 F. Supp. 561, affirmed 136 F. (2d) 655 12
Travelers' Insurance Co. v. Cardillo & Beard, 144 F. (2d) 362 21
Travelers' Insurance Co. v. Cardillo & Lawrence, 141 F. (2d) 364 21
United States v. Monia, 317 U. S. 424 21
Universal Portland Cement Co. v. Spirakis, 79 Ind. App. 17, 137 N. E. 276 17
Voehl v. Indemnity Insurance Co., 288 U. S. 162 4
Ward v. Cardillo, 135 F. (2d) 260 5

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SUMMARY OF ARGUMENT.

1. This case was correctly decided by the United States Court of Appeals for the District of Columbia when it found that the death of the employee did not arise out of or in the course of his employment. The decisions of the courts are virtually unanimous in holding that where the employer

does not furnish the means of conveyance to and from the place of employment and the employee selects his own method of conveyance over which the employer has no control, there can be no compensation award for an injury sustained enroute either home or to work. The facts in this case cannot, through any interpretation, bring this injury within the narrow exceptions that are recognized to the broad general rule that injuries sustained on the way to and from work are not compensable.

As was pointed out in the opinion rendered in this case in the United States Court of Appeals for the District of Columbia (Rec. 61), throughout practically all of the decisions under the Workmen's Compensation Acts of the various states runs the thread of the employer's control over the employee as the distinguishing characteristic which indicates the existence of the relation of master and servant. In this case the employer was exercising no control over the decedent. The decedent had terminated his day's work and was proceeding on his own business at a time and by a means which he himself had freely chosen.

2. It is further the respondents' position that when the United States Court of Appeals for the District of Columbia interprets the Workmen's Compensation Act for the District of Columbia it is passing upon a matter of local concern. The expressed policy of the Supreme Court of the United States is not to disturb such a decision by the Court of Appeals for the District of Columbia unless egregious error has been committed.

3. In addition, it is the respondents' position that the Deputy Commissioner, U. S. Employees' Compensation Commission for the District of Columbia, had no jurisdiction to make an award in this case because the employee had been employed outside of the District of Columbia for over three years prior to the accident, and the injury occurred outside of the District of Columbia.

ARGUMENT.

1. The United States Court of Appeals for the District of Columbia was correct in holding that decedent's injury in no way arose out of or in the course of his employment. The uncontradicted facts, as shown throughout the record, were that the decedent had completely terminated his day's work, was in no way under the supervision or control of his employer, and was at the time of the accident exercising his free, unfettered choice of going where and doing what he pleased on his own time after his work day had completely terminated. He was miles removed from the situs of his job at the time of injury.

Certainly, it was not within the contemplation of Congress when it created a Workmen's Compensation Act for the District of Columbia to make employers in the District insurers of the safety of their employees twenty-four hours a day during periods when they were pursuing their own pleasures or affairs completely divorced from their work. Such a construction would make each employer a life and accident insurance company with all his employees as policyholders.

To urge that the death involved in the case at Bar is compensable under the Act, the petitioner takes the tenuous stand that a $2-per-day allowance made by the employer to all employees in lieu of furnishing actual transportation or transportation expense extended the coverage of the Act to employees while going to and from work. The respondents' position throughout this case in respect to the question raised by the petitioner in this appeal has been twofold:

> 1. That there is no evidence in the record to support a finding that the $2 per day paid to the employees on the Quantico job, where the decedent Ticer was working, was transportation expense.
>
> 2. That even if transportation expense had actually been paid to the decedent, Ticer, still this would not

have brought his injury within the provisions of the Workmen's Compensation Act.

There was nothing in the evidence to show that the $2 a day paid to the employees on the Quantico job was transportation expense. On the contrary, all of the evidence showed that the $2 bore no relation whatsoever to the actual transportation expense incurred by the employees. An employee who lived in Quantico and walked to work every day would receive an additional $2 per day just as an employee who lived in Rockville, Maryland, and traveled by rail every morning to the District and by car or bus to Quantico. There was not even the semblance of a relationship between the actual expense incurred by the employee going to and from the job and the amount actually paid. It is signally interesting to note that the co-employees who were riding with Ticer in his carpool at the time of the accident, and who did not use their cars in the pool, were paying him $1 a day for their transportation. (Rec. 47, 49) The testimony was that the contract to furnish transportation was not being followed at the time of Ticer's death, but that $2 was given each employee in lieu of furnishing transportation or transportation expense. (Rec. 26)

But even assuming that there was evidence to support a finding that the employer paid $2 a day to each employee as reimbursement for actual transportation expenses, still this would not in itself bring the employee "in the course of his employment" while going to and from work in a conveyance of his own choosing. This has been the ruling of virtually every court in the land that has passed on this question. A review of these decisions is in order.

The broad general rule that has been recognized in every jurisdiction in the country as applicable to injuries sustained going to and from work is very succinctly stated by the Supreme Court of the United States in *Voehl* v. *Indemnity Insurance Company*, 288 U. S. 162, 169, a case that is much relied on by petitioner. Here this Court stated:

> "The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment."

In the *Voehl* case the admitted facts were that the employee Voehl was in effect on twenty-four hour a day duty. He was subject to call at all times. At the time he sustained his injury, he was actually engaged in the business of his employer, and since he was actually on the business of his employer, he, of course, was subject to the control of his employer. The facts of the *Voehl* case are in direct antithesis to the facts in the case at Bar. It strains the imagination to fathom how petitioner can derive solace from the opinion rendered in that case. Voehl, at the time of his injury, was actually working for his employer. Ticer, at the time of his injury, had terminated his day's employment and was free to do and go as he pleased.

This Court took cognizance of the fact that Voehl's situation fell within one of the exceptions to the broad general rule by reason of the fact that he was on twenty-four hour a day duty when it said,

> "Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either expressed or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and, hence, within the purview of the Compensation Act."

The United States Court of Appeals for the District of Columbia in the case of *Ward* v. *Cardillo*, 135 Fed. 2d, 260, 262, defined and delimited the exceptions to the broad general rule laid down in the *Voehl* case, *supra*. It recognized

the rule of the *Voehl* case and adopted the following four exceptions to its application:

"1. Where the employment requires the employee to travel on the highway.

2. Where the employer contracts to and does furnish transportation to and from work.

3. Where the employee is subject to emergency calls as in the case of firemen.

4. Where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer."

In every case where compensation has been allowed under the Act for an injury sustained by an employee who was going to or from work the facts can be fitted into one of these four exceptions. The *Voehl* case, *supra*, fits squarely within the third exception for Voehl was an employee who was on call twenty-four hours a day, subject to emergency duty, and this fact was the controlling factor in the decision of the Supreme Court of the United States as indicated by its opinion. The other cases under this Act which involved facts similar to the case at Bar all present situations which fit the cases into the clearly defined exceptions to the broad general rule. In *Employers' Liability Assurance Corporation* v. *Hoag*, 69 Fed. 2d, 227; *Standard Accident Insurance Company* v. *Hoag*, 66 Fed. 2d, 275; and *B. F. Goodrich Company* v. *Britton*, 139 Fed. 2d, 362, where compensation awards were sustained, each of the injured persons fell into the category of salesmen, and, therefore, within the first exception announced in the *Ward* case "where the employment requires the employee to travel on the highway."

In the *Ward* case, there was not only a contract to afford transportation to the employee but the employer did in fact convey the employee to and from his place of work in his the employer's car each day. It is to be noted that in the *Ward* case, the element of control of the employee by the employer is clearly present, inasmuch as transportation was afforded in the employer's own vehicle. Never has this

Court, or any court so far as we can determine, sustained a compensation award under facts like the facts in the case at Bar where the employer did not furnish the transportation and exercised no control over the means by which the employee came to and went from work. As the United States Court of Appeals for the District of Columbia said in its opinion in this case, (Rec. 61)

> "Throughout practically all the decisions we have examined, including those cited by the appellees, runs the thread of the employer's *control* over the employee as the distinguishing characteristic which indicates the existence of the relation of master and servant."

An analysis of the cases factually similar to the one at Bar indicates that the Court of Appeals for the District of Columbia was completely correct in the foregoing statement. The case of *Kerin* v. *Industrial Commission et al.*, 239 Wisc. 617, 2 N. W. 2(d) 223 (February 10, 1942), is identical in every respect with this case. In the *Kerin* case there was a contract between the employees' union and the employer whereby the employer agreed to furnish transportation, board and lodging to the employees who were engaged in work outside of the jurisdiction in which they resided. The employee, Kerin, lived in Sun Prairie, Wisconsin and worked as a journeyman electrician on a job of the employer in Evansville, Wisconsin. His work day was from 8:00 A. M., to 4:30 P. M., one-half hour for lunch, and he was paid for a 48 hour week at the rate of $1.38 per hour. In lieu of the agreement furnish the employees transportation, lodging and board, the employer paid each employee who was working on this job $1.50 per day over and above the fixed hourly wage. This was done so that the employees who desired might commute in their private automobiles to and from their place of work and use the $1.50 per day for gasoline expenses. Kerin availed himself of this right and drove each day in his own car to and from work, transporting some of his co-employees with him. On September 14, 1939, he left work between 4:30

P. M. and 4:45 P. M., and started for his home in Sun Prairie. While enroute home he was involved in a collision and killed.

The Compensation Commission for Wisconsin made an award to his widow. In holding this injury and death not compensable under the Workmen's Compensation Act the Supreme Court of Wisconsin had this to say:

> "A mere additional daily allowance to the employee which he is at liberty to use for board and room at his place of employment or for travel to and from work in the employee's car, does not extend the Compensation Act so as to cover the employee while commuting to and from work.
>
> In the instant case after quitting time at 4:30 P. M., Kerin had nothing to do for his employer until he returned to work the following morning at 8:00 A. M. In the interim the employer had no control over Kerin as to his means of transportation to and from his work, or in any other respect."

In *Public Service Company of Northern Illinois* v. *Industrial Commission, et al.*, 370 Ill. 334 (1939), 18 N. E. 2(d) 914, the employee Beckman worked in Niles Center, Illinois and lived in Blue Island, Illinois. Each day he commuted to and from work. He was allowed by his employer the sum of 67 cents a day to cover the cost of transportation. Just as did Ticer in the case at Bar, Beckman rode to and from work each day in a car pool with some co-employees. He was killed in a collision which occurred while he was driving home after completing his day's work and a compensation award was made to his widow.

In repudiating this award, the Supreme Court of Illinois held that Beckman could not conceivably be said to have been in the course of his employment at the time of the injury saying:

> "In the case before us, Beckman is not shown to have had any duties to perform away from the plant. Whether the 67 cents was wages or expense money is immaterial. His death did not arise out of or in the

course of his employment and his employer is, therefore, not liable."

In *Republic Underwriters v. Terrell, et al.*, 126 S. W. 2(d) 752 (1939) (Texas), the employee, Thomas Terrell, was employed by the Midway Refining Company in Goldsboro, Texas at the rate of $90.00 per month. Terrell lived in the town of Lawn, Texas. In addition to the $90.00 a month wages paid by the Midway Refining Company to Terrell, it supplied him with sufficient gasoline to transport him to and from his place of employment.

On June 13, 1936, Terrell left his home at Lawn at approximately 6:10 P. M., in order to reach work to begin his regular night shift at 7:00 P. M. While enroute to work he was in a collision and died as a result of the injuries sustained therein. The Deputy Commissioner found that he was in the course of his employment and made an award to his widow. This award was affirmed by the lower court. An appeal was taken by the employer. In reversing the lower court, the Court of Civil Appeals of Texas said:

> "In any event the appellees in the instant case seek to take this case out of what is called the general rule and bring it within that class of cases relating to the furnishing by the employer of the means of transportation to and from the place of work. As noted, the contention is predicated upon the fact that the employer furnished as a part of the contract of the employment the gasoline used by the employee in operating his automobile while driving from his home at Lawn to his place of work at Goldsboro, six miles away, and return. In other words, did the employer in providing the gasoline, furnish the employee transportation within the meaning of the so-called exception or under such terms and conditions as to bring the injury within the course of Terrell's employment.
>
> It is undisputed that Terrell owned the automobile. He had exclusive control over it at all times, and the employer had none. The employee's sole purpose in being at the point of injury was simply to reach the employer's premises for his own place of labor. It appears that the test of employer's liability in cases

where he provides transportation is that he has control and direction of the means and use thereof. By such control of the means of transportation, the employer can avoid departure from direct or designated routes and in the exercise of his control he may avoid extra hazards. . . .

After a careful consideration of the facts and circumstances surrounding the death of Terrell, we do not believe it would be a sound proposition of law to hold that he sustained his injuries in the course of his employment on the theory that his employer was furnishing him means of transportation over the highway at the time he met his death. This record presents no theory upon which the judgment can be sustained."

It is to be noted that the Texas Court expressly enunciates the rule that the test, the norm in determining whether an employee is acting "in the course of his employment", is whether or not the employer was exercising any degree of control over him. This is the test that is applied by all the Courts in making determinations of this nature, whether it is actually expressed or not. It is respectfully submitted that in every case where the employee is held to be "in the course of his employment" there is some degree of control being exercised over the employee's activities by the employer even if it be only designating the method of transportation to be used by the employee. But no Court has held an injury sustained when the employee is wholly free of control of the employer to be compensable.

In *Orsinie* v. *Torrance*, 96 Conn. 352, 113 A. 924, the claimant was employed as a laborer in the employer's plant about 7 miles from his home. He had finished work for the day, was waiting for a trolley car, changed his mind, and crossed the highway to get a ride on a truck and was injured. His contract of employment included a provision required by the labor union that because of the distance from work "the employer should either furnish transportation to and from the work or should add the cost of such transportation measured by the prevailing trolley fare to the agreed daily wage." The employer did not actually

provide or furnish the conveyance or means of transportation but added the trolley fare to the daily wage and included it in the weekly payroll. The employees could either walk, or ride in the trolley car, or could use their own cars. The Supreme Court of Errors of Connecticut held that the accident did not occur in the course of employment, stating as follows:

> "This statement of facts does not bring the case within the principles of *Swanson* v. *Latham and Crane*, 101 A. 492. In that case, furnishing of transportation by the employer was a part of the contract of employment, and the injury arose out of a hazard of the transportation which he furnished. In this case the employer did not furnish transportation. He did no more than to pay the wages which the rules of the labor union required him to pay. The fact that because of the location of the work, this wage included a sum measured by the cost of transportation by trolley to and from the work is of no more significance than if it had included a sum measured by the additional cost of food at that place. The claimant was left free to buy his own transportation or not. As soon as he left the employer's premises, the contract of employment ceased to operate directly or indirectly either as controlling his movements or as affecting the hazards to which he was subjected."

It is to be noted that petitioner has placed much reliance on *Swanson* v. *Latham and Crane*, 92 Conn. 87, 101 A. 492. The rule in Pennsylvania is in accord with our position in this case. In *Guenesa* v. *Eidon, Inc.*, 124 Pa. Super 569, 189 A. 524, the Court stated the general rule and exception as follows:

> "The general rule is that an employer is not liable for an accident occurring off its premises to an employee going to and from work.
>
> An exception to that rule is where *the facility for transporting the employee is provided* by the employer as a part of the agreement of employment and the transportation is for the interest of the employer as well as the employee." (Emphasis supplied.)

Then the Court in explaining that the exception did not apply to the case in question, said:

> "Here, while the employee was paid carfare in addition to his salary, the facility of transportation was not provided by the employer. It had no control or authority whatever over the train operated by the railroad company to accommodate the public."

It is to be noted that the Pennsylvania Court employs the "control" test also.

And, finally, in considering the circumstances of the employer paying the employee the amount of money to pay the fare, the Court said:

> "Had the employer paid to the employee in money the exact fare and he had purchased a ticket on which the return home was made, and the accident had occurred, the return would not have been in furtherance of the master's business."

The Court concluded by making an observation entirely pertinent to the status of Ticer in the case at Bar:

> "This claimant, as above stated, was employed for a definite time. Having finished his work for the day, he was a free agent; he could have returned to Philadelphia, or gone where he saw fit, as he was no longer that day in the service of defendant."

The New York cases have special significance with respect to this question, inasmuch as the Longshoremen's and Harbor Workers' Act was adopted from the New York Workmen's Compensation Act and the courts have repeatedly said that decisions under the New York Workmen's Compensation Law rendered prior to the enactment of the Longshoremen's and Harbor Workers' Act should be given weight in construing the provisions of the Longshoremen's and Harbor Workers' Act. *Case* v. *Pillsbury*, 148 F. 2d 392. *Terminal Shipping Company* v. *Branham*, 47 F. Sup. 561, armed 136 F. 2d 655. The leading case in New York on this question is Matter of *Kowalek* v. *New*

York Consolidated Railway Company, 229 N. Y. 489, 128 N. E. 888, decided before the Longshoremen's and Harbor Workers' Act.

In that case, the claimant was an employee of a railroad company and was permitted by his employer to ride to and from work upon the railroad cars free of charge. The employee was killed while on a station platform of his employer waiting for the train to take him home. The Court held that the claimant was not in the course of his employment because the company was indifferent as to the way or means by which the claimant reached the place where the day's work began. Furthermore, the danger to which the claimant was exposed at the time of the accident existed as to all persons who exercised the privilege of using the station. This use was neither connected with nor increased by the hazards of the actual duties of the employment. The claimant had the right to wait upon the platform and take the train to his home as a member of the public and the risks were those to which every person taking the train were subject. The risk as a passenger on the train was that to which the claimant would have been equally exposed apart from his employment. In concluding that the claimant's death did not result from an injury either (1) arising out of the employment, or (2) in the course of the employment, the Court said (p. 494):

> "The statute is not applicable to an injury which arises through a danger or hazard dissociated from or not inherent in the nature of the employment as its source and to which the employee would have been equally exposed apart from the employment. This conclusion is not affected by the fact that the employee would not, except for the employment, have been where such danger or hazard existed. An injury does not arise out of the employment unless the hazard causing it is, within rational apprehension, an attribute of or peculiar to the specific duties of the employment. The fact that the contract of employment exists, and necessitates the acts of performance, may or will occasion for the employee risks not reasonably incidental to the character of the work or employment. For the injuries

> caused by or flowing from those risks, the statute does not direct or permit compensation."

This case is directly analagous to the case at Bar: As far as the means by which Ticer reached the place of his employment were concerned, his employer was indifferent. True, it paid him extra compensation, but it did not either prescribe or furnish the actual means of transportation. When Ticer elected to use his own car upon the public highway, he exposed himself to a danger which existed as to all persons who used the highway for transportation. This danger was not connected with nor was it increased by the hazards of the actual duties of Ticer's employment, namely, working as an electrician at Quantico, Virginia. The hazards of going to and from work were those to which Ticer would have been equally exposed apart from his employment.

The next case in New York was *Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327, decided before the Longshoremen's & Harbor Workers' Act. In this case, the deceased, an employee of a subway company, was riding in one of his employer's trains on a pass to his place of employment at one of the defendant's stations. He was killed en route when two trains collided. In holding that the employee was not in the course of his employment, the Court pointed out that (p. 414):

> "* * * this case differs materially from those cases where the employer, in order to get his employees to and from their work, provides conveyances exclusively for their use which in no sense are public conveyances and in which the employees undertake to ride as part of their contract of employment in going to and from their work."

Thus, the New York Court emphasized that, in order to come within the exceptions of the general rule it is necessary to show that the employer provided conveyances exclusively for the use of the employees.

In Matter of *Keller* v. *Reis and Donovan, Inc.*, 195 A. D. 45, 185 N. Y. S. 741, decided before the Longshoremen's & Harbor Workers' Act, the claimant lived in New York City. His employer's general office was in Manhattan. It had a contract to do some work in a building situated in Newark, New Jersey, and it was necessary for the employee to travel from his home to New Jersey and back every day. The Court stated that the question involved in the case was this:

> "* * * this involves the question of whether an agreement regulating hours and conditions of labor entered into between a labor organization and employers can operate to give a compensable case where none would exist without it."

This agreement between the employer and union provided that an employee traveling beyond a certain, specified point in Manhattan would be compensated for his time while traveling beyond such area. In discussing the effect of this agreement, the Court said (p. 46):

> "But this agreement did not attempt to provide that the employer should become an insurer of the workman against the risks incident to travel upon the public highways . . . the whole purpose of the agreement was to equalize conditions of labor; to provide that the man going outside of the city district should not be obliged to give more time to the employment than those within the district."

And at page 48, the Court said:

> "From this analysis, it is evident that the contracting parties did not contemplate increasing the liabilities of the employer by commencing the employment before the claimant had reached the place of labor. There was no intention of making better conditions for those who went outside the city district than those who worked within the district; it merely protected the man going outside from the hardship of getting up early enough in the morning to reach his employment by eight o'clock. He was doing what his fellow-laborers did in substance when he reached the city district boundary at the time they were called upon to go to work

within that district, and beyond that he was allowed from his labor sufficient time to reach the place of employment without a sacrifice of any part of his day's wages. The agreement obviously sought an equalizing of the conditions of labor for the members of its union, with no purpose to change the provisions of the Workmen's Compensation Law in its relation to such members, and clearly no employer, acting freely, would enter into an agreement to become the insurer of his employees upon their way to work, for the very spirit of the statute is that it is to compensate for the accidents growing out of the employment, and which are properly chargeable against the industry as a part of the cost of production. The claimant may, for aught that we know, have a cause of action against the City of Newark for negligence in the care of its highways, but we are fully persuaded he has no claim against the enterprise conducted by his employer because of an accident happening to him upon the public highways of Newark, while he was doing no service for the employer."

And again in considering whether the accident "arose out of the employment", the Court said at page 49:

"The Act, to quote from a Massachusetts case, cited in Matter of *Alpert* v. *Powers* (223 N. Y. 97, 101), 'does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. * * * The personal injury must be the result of the employment and flow from it as the inducing proximate cause. * * * The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being.' Nothing that the claimant was doing had any relation whatever to the employment; he was doing nothing for the employer. He was serving his own purpose of getting to the place of employment, under an agreement which protected him against loss of time, but which in nowise advanced the well-being of the employer, and the employment to which he was proceeding could in no possible sense be said to be a proximate cause of the accident."

It is interesting to note that the facts in the *Keller* case are identical with those in the case at Bar even to the point that Keller was an electrician and the union contract was with an electrical workers' union.

The rule is the same in Ohio (*Baumback* v. *Industrial Commission of Ohio*, 59 O. App. 101, 17 N. E. (2d) 389); Tennessee (*Norwood* v. *Tellico River Lumber Co.*, 146 Tenn. 682, 244 S. W. 490); Oregon (*In re Finley*, 141 Ore. 138, 16 Pac. (2d) 648); Kentucky (*State Highway Comm.* v. *Saylor*, 252 Ky. 743, 68 S. W. (2d) 26); *Gray* v. *Congleton*, 273 Ky. 716, 93 S. W. (2d) 829); Michigan (*Levchuk* v. *Kraft Cement Products Co.*, 246 Mich. 589, 225 N. W. 559); New York (*Schultz* v. *Champion Welding and Manufacturing Co.*, 230 N. Y. 309, 130 N. E. 304); Indiana (*Universal Portland Cement Co.* v. *Spirakis*, 79 Ind. App. 17, 137 N. E. 276); Utah (*Ogden Transit Co.* v. *Industrial Commission*, 95 Utah 66, 79 Pac. (2d) 17); Louisiana (*Taylor* v. *Gulf Refining Co.*, 11 La. App. 270, 122 So. 162).

Thus it is seen that in virtually every jurisdiction in the country, there are adjudications to the effect that in situations like the one at Bar there is no basis for award of compensation. The test that is applied most generally in determining whether or not an injury sustained by an employee going to and from work is within the course of his employment is whether the employer was in any degree exercising control over his movement at the time that the injury took place. If there is an element of control by the employer, the courts have generally found the injury to have arisen in the course of his employment. Thus, where the employer furnishes the means of transportation and operates it either himself or through an agent, the injury is a compensable one, but, where the employer merely adds some agreed stipend to the daily wage as a cover-all for transportation, leaving to the employee's discretion the means which he will utilize to get to and from work, there is no control over him, and, consequently, the Courts refuse to impute to the employer liability for injuries sustained under these conditions.

A contrary rule would lead to absurd results. If the employer could be held liable for injuries sustained to an employee going to and from work in his own vehicle, operated by himself, where could the line be drawn as to when he was in the course of his employment and when he was not? Would Ticer have been in the course of his employment if he stopped on the way home at a roadhouse to drink intoxicating beverages and remained there for an hour before resuming his trip home? Would Ticer have been in the course of his employment if the members of the car pool had stopped for a lengthy poker game at Quantico before starting home? What time limit would be given the "course of the employee's employment"? How long could he remain under the protection of the Compensation Act with the employer having no right of any kind to control his activities or conduct? To hold this case compensable would do violence to the whole spirit and intention of the Compensation Act. A situation of the kind presented here was clearly not within the comprehension or the contemplation of the legislators when the Act was written onto the books as law.

Every case where there has been an award to an employee for an injury sustained while going to and from work may be clearly placed in one of the four categories of the exceptions set out in the *Ward* case, *supra*. Never have the Courts departed from the broad classification of exceptions. But to allow compensation in the case at Bar would be to break down the presently existing structure of the Compensation law as clearly set out in the *Voehl* case, *supra*, and the *Ward* case, *supra*, and make the term "in the course of employment" so broad, comprehensive and nebulous as to defy further definition.

2. In 1928 the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, U. S. C. Title 33, Chapter 18, Section 901 et seq., was adopted by Congress as the Workmen's Compensation Act for the District of Columbia, (Act of May 17, 1928, 45 Stat. 600, Title 36, Section 501, D. C. Code, 1940 ed.) When Congress set up the Workmen's Compensation Act for the District of Co-

lumbia, it was passing a purely local act with purely local applicability. Just as the Longshoremen's and Harbor Workers' Act had been patterned after the New York Workmen's Compensation Act, so too, in effect, had the Workmen's Compensation Act for the District of Columbia been patterned after the Longshoremen's and Harbor Workers' Act.

In June of this year the Supreme Court of the United States had occasion to consider what authority it would exercise over the courts of the District of Columbia in the interpretation of local statutes. *Fisher* v. *United States*, No. 122, decided June 10, 1946. In the *Fisher* case the Court said (page 10),

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the rules of law which they fashion save in exceptional situations where egregious error has been committed.
>
> "Where the choice of the Court of Appeals for the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere."

The Court then goes on to cite the cases of the *District of Columbia* v. *Pace*, 320 U. S. 698, 702 and *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-5.

It is respectfully submitted that in interpreting the local Workmen's Compensation Act the Court of Appeals for the District of Columbia was passing on a matter of purely local concern and made a choice between what petitioner in his brief concedes are conflicting legal conclusions with respect to the question presented in the case at Bar. In view of this expressed policy of the Supreme Court of the United States made time and again since the case of *Del Vecchio* v. *Bowers*, 296 U. S. 280, it is urged that the decision of the Court of Appeals for the District of Columbia should not be disturbed.

It is respondents' position that in *Del Vecchio* v. *Bowers* (*supra*) sufficient cognizance was not taken of the fact that

the Workmen's Compensation Act for the District of Columbia has a completely different application and comprehension from the Longshoremen's and Harborworker's Act. The latter, as the name implies, applies nationally to longshoremen and harborworkers alone. The Compensation Act for the District applies locally, to office workers, plumbers, clerks, drivers, bakers, electricians, carpenters, in short, to all types of employment. It is purely local in nature, and the policy of this Court toward interpretations of local statutes by the Court of Appeals for the District of Columbia should be given effect.

3. Respondents have taken the position throughout the proceedings in this case that the Deputy Commissioner, U. S. Employees' Compensation Commission for the District of Columbia, had no jurisdiction to make an award in this case because the employee had been employed outside of the District of Columbia for over three years prior to the accident and the injury occurred outside of the District of Columbia. The United States Court of Appeals for the District of Columbia in its decision in this case (Rec. 62) expressly stated that its view of the case made it "unnecessary to consider the question of jurisdiction." Since the lower court has not yet passed upon this question, respondents feel that the question is not properly before the Court at this time. But since the question is jurisdictional in nature and the Court may wish to consider it, respondents herein state their position in this matter.

The Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, 45 Stat. 600, Chapter 612, Title 36, Section 501, D. C. Code, 1940 ed.) states that its provisions

> "shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury occurred; except that in applying such provisions, the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia and the term 'employee' shall be held to mean every employee of any such person."

At first blush, the jurisdictional connotation of this Act is sweeping in its comprehension. However, the most cursory reflection suffices to demonstrate that the intention of the legislators could not have been as broad as this, that there must be some more definite criteria delimiting the jurisdiction of the District of Columbia in Compensation cases than what is stated on the face of the Statute.

As Mr. Justice Frankfurter stated in his dissenting opinion in *United States* v. *Monia*, 317 U. S. 424, 431—"The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious over-simplification."

If the meaning of the above quoted Statute were what is gleaned from a casual and superficial reading of it, it would be a violent denial of substantive due process of law and wholly invalid, for it would mean that a man who lived in Mississippi, for example, where there is no Workmen's Compensation Act and who was hired in Mississippi and who was subsequently injured in that State while working for his employer, could come into the District of Columbia and be given an award of compensation under the District of Columbia Act merely because his employer maintained an office here and had an employee here. Thus, for example, a Mississippi employee of General Electric Company who had never left his own State and who was not entitled to compensation under the laws of his own State could come to the District of Columbia and gain an award under the District of Columbia Act if he were injured while working simply because General Electric has an office and has employees here. The mere suggestion of this situation suffices to show that this could not have been the intention of Congress and that there must be further implied jurisdictional criteria.

Petitioner in his brief cites the cases of *B. F. Goodrich* v. *Britton*, 139 F. 2nd 362, *Travelers Insurance Company* v. *Cardillo and Beard*, 141 F. 2nd 362 and *Travelers Insurance Company* v. *Cardillo and Lawrence*, 141 F. 2d 364, all of which were decided by the Court of Appeals for the

District of Columbia and discussed the jurisdictional aspects of the District of Columbia Workmen's Compensation Act.

The test laid down by the Court in the *Goodrich* case (with reference to the employee's status) is whether a particular person was at the time of the injury an employee *within the District* in the carrying on of the business. In that case, the Court held that the claimant was such an employee because

1. The employee's office was in the District even though his selling contacts were largely outside;
2. The employee's time was nearly equally divided between work inside the District and outside the District and the work in each case was an essential part of the work in the other place since each, in its natural sequence, depended upon the other.

Thus, the rule established by the *Goodrich* case is that where a salesman, in the year preceding the accident, spent 134 working days in the Washington, D. C. office of his employer and 135 working days traveling outside the District selling his employer's products and was injured in the course of his employment outside of the District, the District of Columbia Compensation Commission properly had jurisdiction of his claim for compensation. The factual criteria authorizing the assumption of jurisdiction were: 1. Office in the District; 2. Half of the yearly working days spent in his office in the District; 3. The work outside being dependent upon the work inside and vice versa.

In the *Beard* case, the claimant, a carpenter, was hired by the employer in April, 1940. From that date until July, 1941 (a year and three months), he worked on construction jobs for the employer always in the District of Columbia. From July, 1941, to November, 1941 (a period of four months), he worked on jobs for his employer in Maryland and Virginia. He was injured in November, 1941, while working in the State of Maryland.

Upon this state of facts, the Court held that the claimant was an employee of an employer carrying on an employment in the District, and that, under the *Goodrich* case, the claim was within the jurisdiction of the District of Columbia Act. The Court did not discuss what facts made the employee "an employee within the District" as it did in the *Goodrich* case. So we can only assume that the Court, in holding that where, for seventeen months preceding the accident there is an employment of thirteen months within the District and four months outside the District, there is sufficient employment within the District to justify the assumption that the claimant was an employee within the District.

In the *Laurence* case, the claimant, again a carpenter, was hired by the employer in the District of Columbia in September, 1941, and worked there for about six weeks. He left his employer for awhile, but returned to work on January 13, 1942; and worked in the District until January 20, 1942, making a total of seven weeks' employment within the District. From January 21, 1942, until the day of the accident, February 13, 1942, a period of about three weeks, he worked for the employer outside of the District, where he was injured. Thus, in this case, the Court held that the employee was "an employee within the District", apparently because during a period of ten weeks immediately prior to the accident, he was employed for seven weeks within the District and three weeks outside of the District.

In the case at Bar, the Deputy Commissioner has found as a fact that Ticer was first hired by his employer in about 1934; there is no finding concerning the location at which Ticer worked from 1934 to 1940; in 1940, Ticer worked for the employer in the District of Columbia (presumably for a period of ten months); in November, 1940, Ticer was sent by the employer to a construction job in Quantico, Virginia, which employment continued in Virginia from November, 1940, to December, 1943, a period of over three years.

The question, therefore, to be decided by this Court if the jurisdictional question is considered is as follows:

> Is an employee of a District of Columbia employer an employee within the District in the carrying on of the business, who, for over three years prior to the happening of the accident, was employed as an electrician on a construction job for the employer in the State of Virginia, and who, at no time during that period, did anything for the employer in the District.

The Court of Appeals for the District of Columbia extended its holding in the *Goodrich* case when it decided the *Beard and Lawrence* cases to be compensable. The only basis for extending jurisdiction in the latter cases seems to be that the employee spent more time in the District than he did outside. If the criterion for jurisdiction is whether the employee, during the whole of the employment, spent more time working within the District than he spent working outside of the District, then the claimant in the case at Bar must be denied compensation, for during Ticer's last period of employment he had only a short time here and over three years in Virginia.

Petitioner lays much emphasis on the case of *Alaska Packers' Association vs Industrial Accident Commission of California*, 294 U. S. 532, in discussing the jurisdictional point. In this case the injured employee had left the State of California less than three months before his injury. He had entered into an employment contract in California and was to do work of only a seasonal nature in Alaska, whereas, the injured employee in the case at Bar had been engaged in work in the State of Virginia for a period of three years.

It is respectfully submitted to the Court that it was never the intention of Congress to make the District of Columbia Act applicable to a situation such as the one at Bar and that there was no jurisdiction whatsoever for making an award in this case.

CONCLUSION

For the foregoing reasons, it is further respectfully submitted that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

NELSON T. HARTSON,
ARTHUR J. PHELAN,
EDWARD B. WILLIAMS,
810 Colorado Building,
Washington 5, D. C.,
Attorneys for Respondents,
Liberty Mutual Insurance
Company and E. C. Ernst, Inc.

SUPREME COURT OF THE UNITED STATES

No. 265.—October Term, 1946.

Frank A. Cardillo, Deputy Commissioner, United States Employees' Compensation Commission, Petitioner, *v.* Liberty Mutual Insurance Company, E. C. Ernst, Inc., and Virginia C. Ticer.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 10, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, Deputy Commissioner of the United States Employees' Compensation Commission, issued an order under the District of Columbia Workmen's Compensation Act [1] awarding compensation to the widow of one Clarence H. Ticer. It was specifically found that the injury which led to Ticer's death "arose out of and in the course of the employment." The propriety and effect of that finding are the main focal points of our inquiry in this case.

Section 1 of the District of Columbia Workmen's Compensation Act provides in part that "The provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act,' . . . shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs." The Longshoremen's and Harbor Workers' Compensation Act,[2] § 2 (2), in turn defines the term "injury" to include

[1] Act of May 17, 1928, 45 Stat. 600, D. C. Code, 1940, Title 36, Chap. 5, § 1.

[2] Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*

"accidental injury or death arising out of and in the course of employment. . . ." A finding that the injury or death was one "arising out of and in the course of employment" is therefore essential to an award of compensation under the District of Columbia Workmen's Compensation Act.

In support of his order in this case the Deputy Commissioner made various findings of fact. These may be summarized as follows:

Ticer and his wife were residents of the District of Columbia. He had been regularly employed since about 1934 [3] as an electrician by E. C. Ernst, Inc., a contractor engaged in electrical construction work in the District of Columbia and surrounding areas. In November, 1940, Ticer was transferred by his employer from a project in the District of Columbia to a project at the Quantico Marine Base at Quantico, Virginia. His work at the Marine Base continued for over three years until the time of his injury in December, 1943.

There was in effect at all times an agreement between the electrical workers' union and the employer. Section 15 (b) of this agreement provided that "Transportation and any necessary expense such as board and lodging shall be furnished [by the employer] for all work outside the District of Columbia." The sum of $2 a day was fixed by the parties to this agreement as transportation expense and represented the approximate cost of travel from the District of Columbia to the Quantico Marine Base and return. This sum was paid to Ticer and others in addition to the regular hourly rate of pay. And it was paid in lieu of the employer's furnishing transportation.

Because the job site at the Marine Base was several miles away from the Quantico bus or train terminal, it was necessary for Ticer and his co-workers to drive their own automobiles to and from work. The employees formed

[3] There was one exception. For a period of about 6 months in 1938 or 1939 he worked for the United States Government.

a car pool. Each morning they started from their respective homes in their own automobiles and drove to a designated meeting place at Roaches Run, Virginia. From that point they would proceed in one car to the job site at the Marine Base. This procedure was repeated in reverse in the evening. The workers alternated in the use of the cars between Roaches Run and the job site. Non-members of the car pool each paid the car owner $1 for the round trip.

The employer was aware of the means of transportation being used and acquiesced therein. On December 13, 1943, Ticer was driving his car on a direct route from his place of employment to his home, following the close of the day's work. Four co-workers were riding with him, two of them being non-members of the car pool. As the car approached Fort Belvoir, Virginia, a large stone, which came from under the rear wheel of a passing truck, crashed through the windshield of the car. It struck Ticer's head, crushing his skull. Death resulted four days later.

Ticer's widow presented a claim for compensation. At the hearing before the Deputy Commissioner, the employer and the insurance carrier contended that the Virginia Compensation Commission had sole jurisdiction over the claim and that Ticer's injury did not arise out of or in the course of his employment. The Deputy Commissioner ruled against these contentions. After making the foregoing findings, he entered an order awarding death benefits and funeral expenses to the claimant.

The employer and the insurance carrier then brought this action in the District Court to set aside the order of the Deputy Commissioner. They renewed their jurisdictional objection and alleged a lack of substantial evidence to support the finding that Ticer's injury arose out of and in the course of his employment. The District Court dismissed the complaint, holding that the Deputy Commissioner's findings were supported by evidence in the record

and that the compensation order was in all respects in accordance with law. On appeal, the Court of Appeals for the District of Columbia reversed, one justice dissenting. 154 F. 2d 529. Without passing upon the jurisdictional issue, the court held that Ticer's injury had not arisen out of and in the course of his employment. It felt that Ticer had become entirely free of his employer's control at the close of the day's work at the Marine Base and that he had thereafter assumed his own risk in subjecting himself to the hazards of the highway. We granted certiorari on a petition alleging a conflict with the decision of this Court in *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162.

As noted, the Court of Appeals deemed it unnecessary to dispose of the question whether the Deputy Commissioner had jurisdiction over the instant claim. But in reviewing an administrative order, it is ordinarily preferable, where the issue is raised and where the record permits, an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute. At the same time, however, it is needless to remand this case to the Court of Appeals for a determination of the jurisdictional issue. That issue was considered and determined by the Deputy Commissioner, who was in turn sustained by the District Court. The facts pertinent to that issue are not seriously disputed and the matter has been fully briefed and argued before us. A remand under such circumstances is not warranted. We accordingly turn to a consideration of the jurisdictional issue.

We are aided here, of course, by the provision of § 20 of the Longshoremen's Act that, in proceedings under that Act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary"—a provision which applies with equal force to proceedings under the District of Columbia Act. And the Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. *Davis* v.

Department of Labor, 317 U. S. 249, 256–257. His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record.

The jurisdiction of the Deputy Commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it "shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person." There is no question here but that Ticer was employed by a District of Columbia employer; the latter had its place of business in the District and engaged in construction work in the District, as well as in surrounding areas. But the contention is made that, despite the broad sweep of the statutory language, the Act applies only where the employee, during the whole of his employment, spent more time working within the District than he spent working outside the District. Using that criterion, it is said that the Act is inapplicable to this case since Ticer was employed on a construction job in Virginia continuously for over three years prior to the accident and did nothing within the District for his employer during that period. The implication is that only the Virginia workmen's compensation law is applicable.

But the record indicates that both Ticer and his wife were residents of the District. He had been hired in the District by his employer in 1934 and had worked on various projects in and around the District from that time until 1940, when he was assigned to the Quantico Marine Base project. While at the Marine Base, he was under

orders from the District and was subject to being transferred at anytime to a project in the District. His pay was either carried to him from the District or was given to him directly in the District. And he commuted daily between his home in the District and the Marine Base project.

We hold that the jurisdictional objection is without merit in light of these facts. Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case. The Act in so many words applies to every employee of an employer carrying on any employment in the District of Columbia, "irrespective of the place where the injury or death occurs." Those words leave no possible room for reading in an implied exception excluding those employees like Ticer who have substantial business and personal connections in the District and who are injured outside the District. Whether this language covers employees who are more remotely related to the District is a matter which we need not now discuss and any arguments based upon such hypothetical situations are without weight in this case.

Nor does any statutory policy suggest itself to justify the proposed exception. A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents and to place on District of Columbia employers a limited and determinate liability. See *Bradford Elec. Co. v. Clapper*, 286 U. S. 145, 159. The District is relatively quite small in area; many employers carrying on business in the District assign some employees to do work outside the geographical boundaries, especially in nearby Virginia and Maryland areas. When such employees reside in the District and are injured while performing those outside assignments, they come within the intent and design of the statute to the same extent as those whose work and

injuries occur solely within the District. In other words, the District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury. Nor does it vary with the amount or percentage of work performed within the District. Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case. Such has been the essence of prior holdings of the Court of Appeals. *B. F. Goodrich Co. v. Britton*, 139 F. 2d 362; *Travelers Ins. Co.* v. *Cardillo*, 141 F. 2d 362; *Travelers Ins. Co.* v. *Cardillo*, 141 F. 2d 364. And as so applied, the statute fully satisfies any constitutional questions of due process or full faith and credit. *Alaska Packers Assn.* v. *Industrial Accident Commission*, 294 U. S. 532. Cf. *Bradford Elec. Co.* v. *Clapper*, *supra*.

Hence we conclude that the Deputy Commissioner had jurisdiction under the District of Columbia Act to entertain a claim by the widow of an employee who had been a resident of the District, who had been employed by a District employer and who had been subject to work assignments in the District. We accordingly turn to a consideration of the propriety and effect of the Deputy Commissioner's finding that Ticer's injury arose out of and in the course of his employment.

Our approach to that problem grows out of the provisions of the Longshoremen's Act, as made applicable by the District of Columbia Act. Section 19 (a) of the Longshoremen's Act provides for the filing of a "claim for compensation" and specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Thus questions as to whether an injury arose out of and in the course of employment necessarily fall within the scope of the Deputy Commissioner's authority. Section 21 (b) then provides

that compensation orders may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law."

In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. *Voehl* v. *Indemnity Ins. Co., supra,* 166; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287; *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 257–258; *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 246; *Davis* v. *Department of Labor, supra,* 256.

It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm* v. *Commissioner,* 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio* v. *Bowers supra,* 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor*

Board v. *Hearst Publications*, 322 U. S. 111, 131; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119, 124; *Unemployment Compensation Commission* v. *Aragan*, 329 U. S. —— (slip opinion, p. 9). Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only "if not in accordance with law."

Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course of his employment. If there is factual and legal support for that conclusion, our task is at an end.

A reasonable legal basis for the Deputy Commissioner's action in this respect is clear. The statutory phrase "arising out of and in the course of employment," which appears in most workmen's compensation laws, is deceptively simple and litigiously prolific.[4] As applied to injuries received by employees while traveling between their homes and their regular places of work, however, this

[4] "The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute." Lord Wrenbury in *Herbert* v. *Fox & Co.* [1916] 1 A. C. 405, 419. See also Dodd, Administration of Workmen's Compensation (1936), pp. 680–687; Horovitz, "Modern Trends in Workmen's Compensation," 21 Ind. L. J. 473, 497–564; Horovitz, Injury and Death Under Workmen's Compensation Laws (1944), pp. 93–173; Brown, "'Arising out of and in the course of the employment' in Workmen's Compensation Laws," 7 Wis. L. Rev. 15, 67, 8 Wis. L. Rev. 134, 217.

phrase has generally been construed to preclude compensation. *Voehl* v. *Indemnity Ins. Co., supra,* 169. Such injuries are said not to arise out of and in the course of employment; rather they arise out of the ordinary hazards of the journey, hazards which are faced by all travelers and which are unrelated to the employer's business. But certain exceptions to this general rule have come to be recognized. These exceptions relate to situations where the hazards of the journey may fairly be regarded as the hazards of the service. They are thus dependent upon the nature and circumstances of the particular employment and necessitate a careful evaluation of the employment terms.

Under the District of Columbia Workmen's Compensation Act, at least four exceptions have been recognized by the Court of Appeals: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer. *Ward* v. *Cardillo,* 135 F. 2d 260, 262. See also *Lake* v. *Bridgeport,* 102 Conn. 337, 128 A. 782. In performing his function of deciding whether an injury, incurred while traveling, arose out of and in the course of employment, the Deputy Commissioner must determine the applicability of these exceptions to the general rule. Here he decided that the second exception was applicable, that Ticer's employer had contracted to furnish transportation to and from work and had paid the expense of transportation in lieu of actually supplying the transportation itself. We cannot say that he was wrong as a matter of law.

There are no rigid legal principles to guide the Deputy Commissioner in determining whether the employer con-

tracted to and did furnish transportation to and from work. "No exact formula can be laid down which will automatically solve every case." *Cudahy Packing Co. v. Parramore*, 263 U. S. 418, 424; *Voehl v. Indemnity Ins. Co., supra*, 169. Each employment relationship must be perused to discover whether the employer, by express agreement or by a course of dealing, contracted to and did furnish this type of transportation. For that reason it was error for the Court of Appeals in this case to emphasize that the employer must have control over the acts and movements of the employee during the transportation before it can be said that an injury arose out of and in the course of employment. The presence or absence of control is certainly a factor to be considered. But it is not decisive. An employer may in fact furnish transportation for his employees without actually controlling them during the course of the journey or at the time and place where the injury occurs. *Ward v. Cardillo, supra.* And in situations where the journey is in other respects incidental to the employment, the absence of control by the employer has not been held to preclude a finding that an injury arose out of and in the course of employment. See *Cudahy Packing Co. v. Parramore, supra; Voehl v. Indemnity Ins. Co., supra.*[5]

Indeed, to import all the common law concepts of control and to erect them as the sole or prime guide for the Deputy Commissioner in cases of this nature would be to encumber his duties with all the technicalities and unrealities which have marked the use of those concepts in other fields. See *Labor Board v. Hearst Publications, supra*, 120–121, 125; *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 723–725. That we refuse to do. "The

[5] See also *Gagnebin v. Ind. Acc. Comm.*, 140 Cal. App. 80, 34 P. 2d 1052; *Keely v. Metropolitan Edison Co.*, 157 Pa. Super. 63, 41 A. 2d 420; *McKinney v. Dorlac*, 48 N. M. 149, 146 P. 2d 867; *Exelbert v. Klein & Kavanaugh*, 278 N. Y. S. 377, 243 App. Div. 839.

modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common law liability of the master for personal injuries to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions." *Cudahy Packing Co.* v. *Parramore, supra*, 423.

Nor is there any other formal principle of law which would invalidate the choice made by the Deputy Commissioner in this instance. The fact that Ticer was not being paid wages at the time of the accident is clearly immaterial. *Cudahy Packing Co.* v. *Parramore, supra.*[6] And it is without statutory consequence that the employer here carried out his contract obligation to furnish actual transportation by paying the travel costs and allowing the employees like Ticer to make the journey by whatever means they saw fit. To be sure, there are many holdings to the effect that, where the employer merely pays the costs of transportation, an injury occurring during the journey does not arise out of and in the course of employment; there must be something more than mere payment of transportation costs.[7] But assuming those holdings

[6] "Nor is it ['in the course of employment'] limited to the time for which wages are paid. Indeed the fact that the workman is paid wages for the time when the accident occurs is of little, if any, importance." Bowlen, "A Problem in the Drafting of Workmen's Compensation Acts," 25 Harv. L. Rev. 328, 401, 402. *Turner Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 490.

[7] *Public Sevice Co. of Northern Illinois* v. *Industrial Commission*, 370 Ill. 334, 18 N. E. 2d 914; *Guenesa* v. *Ralph V. Rulon, Inc.*, 124 Pa. Super. 569, 189 A. 524; *Republic Underwriters* v. *Terrell*, (Tex. Civil App.) 126 S. W. 2d 752; *Orsinie* v. *Torrance*, 96 Conn. 352, 113

to be correct and assuming the Deputy Commissioner's findings in this case to be justified, there is more here than mere payment of transportation costs. It was found that Ticer's employer paid the costs as a means of carrying out its contract obligation to furnish the transportation itself. Where there is that obligation, it becomes irrelevant in this setting whether the employer performs the obligation by supplying its own vehicle, hiring the vehicle of an independent contractor, making arrangements with a common carrier, reimbursing employees for the use of their own vehicles, or reimbursing employees for the costs of transportation by any means they desire to use. In other words, where the employer has promised to provide transportation to and from work, the compensability of the injury is in no way dependent upon the method of travel which is employed.[8] From the statutory standpoint, the employer is free to carry out its transportation obligation in any way the parties desire; and the rights of the employees to compensation are unaffected by the choice made.

Turning to the factual support for the Deputy Commissioner's inference that Ticer's injury arose out of and

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A. 924; *Kowalek* v. *New York Consolidated R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327; *Keller* v. *Reis & Donovan, Inc.*, 185 N. Y. S. 741, 195 App. Div. 45; *Levchuk* v. *Krug Cement Products Co.*, 246 Mich. 589, 225 N. W. 559. See annotations in 20 A. L. R. 319, 49 A. L. R. 454, 63 A. L. R. 469, 87 A. L. R. 250, 100 A. L. R. 1053. Cf. *Netherton* v. *Coles*, [1945] 1 All E. R. 227.

[8] See *In re Donovan*, 217 Mass. 76, 104 N. E. 431; *Breland* v. *Traylor Engineering & Mfg. Co.*, 52 Cal. App. 2d 415, 126 P. 2d 455; *Lehigh Nav. Coal Co.* v. *McConnell*, 120 N. J. L. 428, 199 A. 906; *Burchfield* v. *Department of Labor and Industries*, 165 Wash. 106, 4 P. 2d 858; *Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 A. 492; *Cary* v. *State Industrial Commission*, 147 Okla. 162, 296 P. 385; *Williams* v. *Travelers Ins. Co. of Hartford, Conn.*, (La. App.) 19 So. 2d 586; *Turner Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 489.

in the course of employment, we find ample sustaining evidence. Ticer's employment was governed by the terms of a long-standing agreement between Local Union No. 26, International Brotherhood of Electrical Workers (of which Ticer was a member) and the Institute of Electrical Contractors of the District of Columbia, Inc. (of which the employer was a member). Rule 15 (b) of the agreement provided that "Transportation and any necessary expense such as board and lodging shall be furnished for all work outside the District of Columbia."

The employer carried out in different ways this obligation to furnish transportation. On certain construction jobs in the past, it actually furnished a station wagon or a passenger car of its own to transport the employees. At other times, however, it paid the employees an allowance to cover the cost of transportation in lieu of furnishing an automobile. Where the latter course was followed, the written contract was not amended or changed in any way, the employer simply communicating with the union to ascertain the amount necessary to defray the cost of transportation. The amount agreed upon affected all contractors in the Institute; and the cost of transportation was determined before the contractors made their respective bids.

On the Quantico Marine Base project, the sum of $2 per day was agreed upon as the transportation allowance in lieu of furnishing an automobile. This amount was fixed after investigation into the cost of transportation by railroad and was paid to each employee, irrespective of his rate of pay, to cover the cost of transportation to and from the Marine Base. No change was made in the written contract.

There was also evidence that the distant location of the Marine Base project, the hours of work and the inadequacy of public transportation facilities all combined to make it essential, as a practical matter, that the employer furnish

transportation in some manner if employees were to be obtained for the job. This was not a case of employees traveling in the same city between home and work. Extended cross-country transportation was necessary. And it was transportation of a type that an employer might fairly be expected to furnish. Such evidence illustrates the setting in which the contract was drawn.

The Court of Appeals felt, however, that the original contract to furnish transportation was not followed and that a new oral contract to pay transportation expenses was substituted in its place. We need not decide whether that view is justified by the record. It is enough that there is sufficient evidence to support the Deputy Commissioner's view that the payment of transportation costs was merely one way of carrying out the original contract obligation to furnish the transportation itself.

We therefore hold that, under the particular circumstances of this case, the Deputy Commissioner was justified in concluding that Ticer's injury and death arose out of and in the course of his employment. And since the Deputy Commissioner had jurisdiction over this case, the resulting award of compensation should have been sustained.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent.